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In the

Supreme Court of the United States

No. 1058

H. M. HARRINGTON, JR.,
Petitioner,

v.

TEXACO, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To: The Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

NOW COMES H. M. Harrington, Jr., a resident and citizen of the State of Texas, and files this, his petition praying that a Writ of Certiorari issue to review the judgment entered by the United States Court of Appeals for the Fifth Circuit on December 4, 1964, and the order of such Court

entered on February 9, 1965, denying this Petitioner's motion for rehearing.

STATEMENT OF THE CASE

This is a case of first impression in Texas. The lower courts have justified a judgment against Petitioner Harrington in an action for conversion of oil and gas for more than other defendants similarly situated because of heretofore uncited and unconstrued Texas Statute (Art. 6035), and Railroad Commission Rule (32), neither of which purports to deal with conversion or the liability of defendants in cases of conversion. The result is to violate the previously established rules in Texas law that conversion requires a positive affirmative tortious act and that mere non-feasance will not suffice. The result conflicts with the Texas rules making each tort-feasor liable for only his own portion of severable and divisible damage claims. And the result is contrary to the cases which have sought to enforce liability under doctrines of Texas law on conversion. In view of the fact that the Texas courts themselves have not construed the Statute and Railroad Commission Rule, the importance of this case justifies the granting of the Writ of Certiorari; otherwise, due process of law becomes a mockery.

This cause of action was filed in the United States District Court for the Eastern District of Texas, Tyler Division, by Texaco, Inc. as a citizen of the State of Delaware, against the Petitioner, H. M. Harrington, Jr. and five other Texas citizens for damages for the alleged conversion of oil by means of a deviated well which the jury found to be bot-

tomed beneath and producing oil from under Texaco, Inc.'s lease. All matters of fact, other than the question of the deviation of the well, were stipulated in the pre-trial order in the lower court. By such pre-trial order or stipulation, the exact amount of oil sold, and under the jury's finding, thus converted by each party owning an interest in such well was set out, and in addition thereto, it was stipulated that the Defendant Baton was the designated "operator" of the well before the Railroad Commission of Texas at the time it was drilled, but that subsequently, this Petitioner became such designated "operator" by the filing of a Form 7 report required by the State regulatory agency, the Railroad Commission of Texas, specifying his name, address and that he was an individual rather than a partnership or corporation. Based upon this designation of "operator", but without proof of any kind as to what this Petitioner as "operator" did, the trial court on the 12th day August, 1963, entered judgment against each of the other defendants for the amount of money representing the exact portion of the oil sold, and thus converted by each such party; but as to this Petitioner discriminated against him and in addition to entering judgment against him for the amount of oil sold by him, the lower court entered judgment as to this Petitioner for oil sold, and thus converted by all the other owners. This Petitioner was thereby held accountable for conversion by others, by reason of *the mere designation of "operator"* before the Railroad Commission of Texas, without proof of any act of conversion as to such excess amounts by this Petitioner. The judgment of the trial court, (R. 50) is not reported in an

official reporter, but for the convenience of this Court is contained within the Appendix under the Record page number.

The United States Court of Appeals for the Fifth Circuit affirmed the trial court's decision on December 4, 1964. (R. 483). The opinion is reported in 339 Fed. 2d, 814, and for the convenience of this Court is copied in the Appendix under the Record page number. (R. 469). The ruling on the particular phase of the case upon which this Petition is predicated, held: (R. 474)

> "The next attack relates to Harrington alone. He complains of the entry of judgment against him for an amount in excess of that actually received by him. The judgment cast Harrington jointly for amounts received by Allgood and Lutes, whereas each of them was held to account only for what each received. The basis for holding Harrington jointly liable with everyone receiving payment for oil taken from Texaco is that he was the designated operator-lessee of the well.
>
> "As designated operator, under the relevant statutes and Railroad Commission regulations,[10] a number of important obligations rested on him, compliance with which inevitably put the 'operator' in operational control of continued production by the well. Thus, Railroad Commission Rule 32 requires the operator to keep regular and complete records of production, sales, receipts, business disbursements, etc. He must file the official, periodic production reports with governmental agencies and make reports of work-overs and the like. Generally, he is the man in charge. See Summers, Oil & Gas, §§ 651-52 (1962).
>
> "The fact that no effort was made to establish that Harrington had wilfully deviated the well is not rele-

[10] Tex. Civ. Stat. Ann. Art. 6035 (1962); Railroad Commission Rule 32.

> vant to the joint liability issue since such intent is not required to make out conversion. 14 Tex. Jur. 2d, *Conversion* Sec. 3. It is entirely reasonable to subject a designated operator having such immediate, practical operational command over day-to-day production activities of the well to an accountability for an unlawful conversion of all of the oil."

This is a Texas case. Since Erie R. R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. ed. 1188, 114 A.L.R. 1487, this Honorable Court has required in cases such as this, that the lower courts follow the law of the state involved. Under Texas law, one's liability for conversion extends only to his owns acts. Yet the lower courts have held that Petitioner Harrington must respond in damages not only for oil sold by him, but also, for oil sold by the other defendants, Lutes and Allgood, and by Texas Pacific Coal & Oil Company, merely because Harrington was for the two-year period in question, designated before the Railroad Commission of Texas as "operator". Thus, the one point raised by this application for Writ of Certiorari is the denial of due process to Petitioner Harrington through the failure of the federal lower courts to follow state substantive law, and in applying as to him unjust discrimination.

OPINION BELOW

The District Court for the Eastern District of Texas, Tyler Division, filed no opinion. The judgment of such court is reflected in the transcript of the record, (R. 50), and for the convenience of the Court is copied in the Appendix. The opinion of the United States Court of Appeals for the Fifth Circuit affirming the judgment of the trial court was handed

down on December 4, 1964, (R. 469), and is officially reported in 339 Fed. 2d 814, and for the convenience of the Court is copied in the Appendix. Petitioner filed a motion for rehearing with the United States Circuit Court of Appeals for the Fifth Circuit on December 21, 1964, (R. 484), and such court overruled such motion on February 9, 1965, (R. 507), without a further written opinion. From such judgment and order overruling the motion for rehearing, this Petitioner is filing this Petition for Writ of Certiorari within the time allowed by law.

GROUNDS OF JURISDICTION

Jurisdiction is conferred on this Court to review this cause by Writ of Certiorari by U.S.C. Title 28, Sec. 1254(1). The judgment of the United States Court of Appeals for the Fifth Circuit sought to be reviewed is dated December 4, 1964, (R. 483), to which a motion for rehearing was filed by this Petitioner on December 21, 1964, (R. 484), and was overruled by such court on February 9, 1965. (R. 507). The portion of the opinion sought to be reviewed is that portion holding this Petitioner responsible for conversion of oil by others without proof of any act of conversion thereof on his part. Why should he be liable for such acts of third parties? The holding of the Fifth Circuit that as a matter of law the Tex. Civ. Stat. Ann. Art. 6025, and Railroad Commission Rule 32, render such designated "operator" fully liable without other proof, is contrary to the law of Texas. The decision on this unjust point of discrimination is not in keeping with the law of the State of Texas and requires this

Court to review and correct this particular error pronounced by the Court of Civil Appeals for the Fifth Circuit, because:

(a) the Court of Appeals for the Fifth Circuit has rendered a decision deciding an important state case in a way in conflict with applicable state law;

(b) and, the Court of Appeals for the Fifth Circuit in rendering its decision has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

THE QUESTION PRESENTED

Does the Texas Civil Statute Annotated, Art. 6035, and the Railroad Commission of Texas, Rule 32 requiring the filing of Form 7 setting out the designated "operator" of a well for identification purposes, of themselves constitute an act of conversion rendering a resident citizen of the State of Texas liable for conversion by other parties without a showing of an "act" connecting such designation of "operator" with the conversion of oil for which damages are rendered? With this question, of course, is presented the basic question, may one be held for conversion without some showing of a positive act of control or dominion over the oil converted by others? To phrase it in another manner, may a citizen of the United States be deprived of his rights and properties without some proof of an "act" of conversion on his part on the mere supposition of the meaning of the word "operator" required on a form of the Railroad Commission of Texas?

STATEMENT OF THE FACTS

First to be considered are the statute and rule relied upon by the lower courts in making their discriminatory ruling. These are: Art. 6035, Tex. Civ. Stat. Ann. which reads as follows:

> "REPORT TO COMMISSION. — Any person, firm, partnership, joint stock association, corporation or oth- organization, domestic or foreign, operating wholly or partially within this State, acting as principal or agent for another, for the purpose of drilling, owning or operating any oil or gas well, or owning or controlling leases of oil and mineral rights or the transportation of oil or gas by pipe line, shall immediately file with the Commission the name of the company or organization, giving the name and post-office address of the organization, the plan under which it was organized, and the names and post-office addresses of the trustee or trustees thereof, and the names and post-office addresses of the officers and directors.";

and Railroad Commission of Texas Rule 32, which reads as follows:

> "BOOKS TO BE KEPT—REPORTS TO BE MADE. —All owners and operators of oil and gas wells in this State shall keep books showing accurately the amount of stock sold and unsold and amount of promotion money paid, amount of oil and gas produced and disposed of, with the price for which the same was sold, together with the receipts from the sale or transfer of leases or other property, and the disbursements made in connection with or for the benefit of such business; which books shall be kept open for the inspection of the Railroad Commission of Texas or any accredited representative thereof, and of any stockholder or shareholder or royalty owner in said business, and shall report such information, when required by the Commis-

> sion to do so. Any person, firm, partnership, joint stock association, corporation or other organization, domestic or foreign, operating wholly or partially within this State, acting as principal or agent for another, for the purpose of drilling, owning or operating any oil or gas well, or owning or controlling leases of oil and mineral rights, or the transportation of oil or gas by pipe lines, shall immediately file with the Railroad Commission of Texas at Austin, the name of the company or organization, giving the name and post office address of the organization, the plan under which it was organized, and the names and post office addresses of the trustees thereof, and the names and post office addresses of the officers and directors."

It is to be noticed that both the Texas Statute and Rule 32 of the Railroad Commission require a report to be filed with the Railroad Commission giving the operator's name, post office address and plan of organization, that is, whether an individual, as in the case of the Petitioner, or a trust, or a corporation in which event the trustees and the officers of the corporation would have to be named. Beyond the requirement for the filing of this Form 7, with the Commission, the Statute and Rule only require some records to be kept. The primary purpose of such records is obviously to see how much promotion money was developed on a corporation stock sale, none of which is applicable in the present situation; or is for the purpose of identification of a lease in the Commission records, i.e., H. M. Harrington, Jr.—Texas Pacific Coal & Oil Lease.

The pre-trial order stipulates all matters of fact involved in this appeal. It is shown in the record, (R. 35), and a copy

thereof for the convenience of this Court is in the Appendix under the Record page number.

From the pre-trial order the plaintiffs' and defendants' claims become apparent and the facts involved in this Petition are definitely set out. The plaintiffs' suit is "based upon the allegation that a well surfaced on defendants' lease is a slanted or deviated well bottomed in, and producing from a point in, the sub-surface of plaintiffs' 200-acre lease." (R. 35). The plaintiff sued, "only for oil and gas taken from its ⅞ths leasehold estate, not for royalty oil and gas." The defendants' leasehold estate, which consisted of a ⅝ths leasehold; (The Texas Pacific Coal & Oil Company holding a ¼ royalty), is stipulated to be "at all times material to this lawsuit was, and is, owned by the following persons: H. M. Harrington, Jr. — one-third (⅓); Charles W. Lutes, one-third (⅓); Reid H. Allgood, one-sixth (⅙); J. W. Baton, one-twelfth (1/12); and Douglas Godfrey, one-twelfth (1/12)." (R. 39). The stipulation further specifically sets out: "The Railroad Commission of Texas Form 7 designation of the operator of the well was filed by J. W. Baton, operating under the trade name of 'HAL Company.' The well was operated under this name from the date of the drilling of the well until July 30, 1953. Thereafter, H. M. Harrington, Jr. was designated operator of the well from that time until the well was shut-in during July 1962." (R. 40).

It is this stipulation upon which the Court of Appeals has based its judgment against Harrington for the amount

in excess of what Harrington received. There is nothing further in either the pre-trial stipulation or the evidence to, in any-way, be a basis for a judgment against Harrington for conversion of oil that was sold by other persons to whom the proceeds were paid by the purchaser. The proceeds from these sales were not paid to Harrington. The pre-trial stipulation specifically sets out: "That the money derived from the sale of the oil and gas produced through such well was distributed pursuant to such division orders as follows:

H. M. Harrington, Jr.	one-fourth (¼)
Reid H. Allgood	one-eighth (⅛)
Charles W. Lutes	one-fourth (¼)
John W. Baton	one-sixteenth (1/16)
Douglas Godfrey	one-sixteenth (1/16)
Texas Pacific Coal & Oil Co.	one-fourth (¼)." (R. 40)

The pre-trial order or stipulation then limits the recovery to two years, and specifically provides, "the fair market value of the oil and gas produced through such well during such period is NINETY-FIVE THOUSAND, FIVE HUNDRED FORTY-SIX AND 92/100 ($95,546.92) DOLLARS." (R. 41).

Predicated upon the jury finding that the well in question was bottomed beneath the plaintiff's lease, the Court entered judgment against the defendants not on the same basis and Petitioner Harrington complains of the discrimination used against him. The discrimination is best shown by illustration from the agreed pre-trial stipulation.

> The fair market value of the oil and gas produced through the well during the two-year

period immediately preceding the filing of the cause of action was agreed to be, (R. 42)		$95,546.92
The claim of Texaco, Inc. was for ⅞ of the oil and gas produced, or (R. 36)		83,603.56
This sum of money was paid by the pipe line to the following people in the proportions shown: (R. 40)		
H. M. Harrington, Jr.	¼	20,900.89
Charles W. Lutes	¼	20,900.89
Texas Pacific Coal & Oil	¼	20,900.89
Reid H. Allgood	⅛	10,450.45
J. W. Baton	1/16	5,225.22
Douglas Godfrey	1/16	5,225.22
Total		$83,603.56
Judgment was rendered as against Lutes (and jointly as against Harrington) for the sum received by him stated above, plus 6% interest from July 29, 1962, or a total of, (R. 52)		$22,154.93
Judgment was rendered as against Allgood, (and jointly as against Harrington) for the sum received by him stated above, plus 6% interest from July 29, 1962, or a total of, (R. 52)		$11,077.47
The judgment against Harrington, however, was not for the sum he had received plus interest, but was for in addition to the above jointly pronounced amounts, the sum of, (R. 53)		$38,369.71

The record shows the basis for the difference in the rendition by the wording of the judgment itself. The Trial Court held Harrington accountable for the $20,900.89 paid to the Texas Pacific Coal & Oil Company during the two-year period in question, but allowed only 20% of the

$20,109.59 received by the Plaintiff in its settlement out of court with that company. (R. 51.)

All of these matters are clearly reflected in the opinion of the Fifth Circuit. (R. 470-471.) There is no complaint of error in the stipulated facts, but there is complaint as to the lower courts' assumption without proof that an "operator" on the Railroad Commission records is an "act" of conversion.

It must be observed that judgment was rendered against the defendant Allgood for the exact amount of oil he sold to the pipeline and for which he had been paid during the two-year period, which under the jury finding, he had converted. It should also be noticed that the Petitioner Harrington was also held jointly responsible for this same sum merely because he was the designated "operator." Judgment was rendered against the defendant Lutes for the exact amount of oil he sold to the pipeline and for which he had been paid during the two-year period which, under the jury finding, he had converted. Petitioner Harrington was also held jointly for this same sum of money merely because he was the designated "operator." The judgment rendered against Harrington, however, who had sold, and thus under the jury finding, had converted the exact amount of oil to the barrel and the exact amount of dollars to the penny, as compared with the defendant Lutes, is rendered for a sum greatly in excess of this amount. This sum represented oil sold, and thus under the jury finding, converted by the royalty owner, Texas Pacific Coal & Oil Company.

Judgment in the sum in excess of that received by Harrington is predicated on an erroneous conclusion that as a matter of law Tex. Civ. Stat. Ann., Art. 6035, and Rule 32 of the Railroad Commission imposes upon an operator without proof of any act of conversion, total liability. This, the Petitioner believes to be error which this Court should correct.

ARGUMENT AND AUTHORITIES

There have been only three of the so-called "slant-hole" cases to reach the Federal Appellate Courts. The first of such cases was *Pan Amer. Pet. Corp. v. Orr*, 5th Cir. 1963, 319 Fed. 2d 612, opinion by Judge Hutcheson, which laid down two basic rules of law, to-wit: (a) "In deciding this, we are sitting as a Texas Court. It is not within our province to approve or disapprove or to refuse to apply the applicable rules of law * * * we are bound by Texas law." for which ruling the Fifth Circuit cited *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 82 L. Ed. 1188; and then held (b) that the Texas two-year statute of limitations was applicable, the Court saying: "Each case must be decided according to the applicable rules of law and the facts proven."

The present case was the second of such cases to reach the Fifth Circuit and was argued before three different Judges, Judge Brown writing the opinion. The Petitioner does not believe the Fifth Circuit in this case followed the basic rules of the first case quoted above. It is Petitioner's contention such court in the instant case failed to follow the Texas law and failed to apply such law to "the facts proven."

The third such case to reach the Fifth Circuit was *Pan-Amer. Pet. Corp. v. Long*, 5th Cir., 1964, 340 Fed. 2d 211, opinion handed down on December 30, 1964. (No. 21,159.) In this third case the Fifth Circuit laid down rules of law applicable to conversion which it had failed to apply to Petitioner's case. The opinion holds:

> "In this case, ascertainment of the applicable legal rules governing the tort of conversion presents no real difficulty, and the problem is whether under these circumstances, conversion is made out. Although the formula has been variously worded by the Courts of Texas, the fundamentals of conversion have been fairly consistently defined. In its brief SWL states a definition which apparently has garnered wide acceptance. Conversion is '* * * the unlawful and wrongful exercise of dominion, ownership, or control by one person over the property of another, to the exclusion of the same rights by the owner, * * *.' France v. Gibson, Tex. Civ. App., 1907, 101 S.W. 536.
>
> "From all definitions encountered the rubric seems to be *some distinct act of dominion or control* over the personal property of another. The convertor may either have actual or constructive possession of the property. Although the act of control or dominion must be *positive and affirmative* (*Mere non-feasance will not do*), a wrongful or fraudulent intent or purpose is not required, and the presence of good faith in the convertor is relevant only on the issue of damages." (Italics ours.)

Had the lower courts followed the law of conversion as they have thus declared it and required "some distinct act of dominion or control" on the part of Harrington over the oil converted by others, then its judgment would not now have to be reviewed by this Court; but, the Fifth Circuit by its assumption that the designation of "operator" on

the Railroad Commission records was such an act of dominion as to constitute conversion, is erroneous.

The Fifth Circuit in the *Long* case held that the sale of oil by division order was a conversion by each party selling oil thereunder. That Court in this connection said: "We therefore believe that with regard to this latter context, the law of Texas is that a *division order is the operative instrument of transfer*, whether called a contract or not, and until revoked is binding on the parties, who thereunder, declare their present ability and intent to transfer, sell, or otherwise dispose of the oil to the pipeline, and their entitlement to payment for this same transfer." (Italics ours.)

Applying this ruling to Petitioner, it follows that under the pre-trial stipulation in the present case, each party sold, and thus converted, its exact portion of the oil by means of the division order executed. The oil sold by Texas Pacific Coal & Oil Company under the division order as stipulated in this case, was a conversion by it of ¼ of the oil. The same would be true of the oil sold to the pipeline by Lutes and by Allgood. The fact that Harrington was the designated "operator" had nothing to do with conversion of the oil by these particular parties. It must be remembered that it was J. W. Baton who was the designated "operator" of the well at the time the well was drilled, and Harrington was not designated until later. It cannot, therefore, be assumed that Harrington as the designated "operator" committed any act of dominion or control as to the oil sold by the other parties.

We submit to the Court that the first fundamental principle of conversion which has been uniformly recognized throughout this country is that to recover for a claimed conversion it must be established that the claimed converter has committed some "act" of conversion which has directly resulted in changing the possession of the owner as to a particular property—in this case, barrels of oil. The second principle is that the mere designation on Form 7 of the Railroad Commission that H. M. Harrington, Jr., an individual, with his post office address at Longview, Texas, as the designated "operator" before the Railroad Commission, is not an "act" of conversion which in-any-way did, or could have, converted Texaco's oil.

This first and fundamental principle of conversion is well set out in 52 Am. Jur., 819, where in defining conversion and setting out its necessary elements our law is laid down as follows:

> "A conversion takes place where a person does such acts in reference to the personal property of another as amount, in view of the law, to the appropriation of the property to himself. Indeed, the general rule is that there is no conversion until some act is done which is a denial or violation of the Plaintiff's dominion over or rights in the property. * * * moreover, an act, to be conversion, must be essentially tortious."

Outside of the above general citation of authority since the case before the Court is one originating in Texas, we have confined the following authorities to those of the local Texas law.

We find in 42 Tex. Jur. 511, and 14 Tex. Jur. 2d 11, the Texas Law dealing with the nature and elements of conversion, the principle of law is laid down that, "To constitute a conversion, there must be a positive tortious act—that is, an act of malfeasance and not a mere nonfeasance." The lower courts have not followed this basic principle.

The lower courts assumed that since intent is not an element of conversion, that the designation of "operator" without further proof of any "act" or damages resulting from such designation as a matter of law in effect, is an "act" of conversion. This is in conflict with applicable state law.

One of the early Texas cases discussing conversion is *Gulf C. & S. F. Ry. Co., v. Pratt*, 183 S.W. 102, 104, error refused, wherein intent and the requirement for the performance of an "act" of conversion is brought out. The Court in the case lays down what has since come to be recognized as our Texas law on conversion. The opinion holds:

> "'Conversion' is defined to be '*an unauthorized act* which deprives a man of his property permanently or for a definite length of time.' France v. Gibson, 101 S.W. 537; Union Stockyards et al., v. Mallory et al., 157 Ill. 554, 41 N.E. 888, 48 Am. St. Rep. 341.
>
> "The legal wrongdoing denominated a 'conversion' is: 'Any *unauthorized act of dominion* or ownership exercised by one person over personal property belonging to another. * * * Acts of conversion have been classified as follows: (1) A taking from the owner without consent; (2) an unwarranted assumption of ownership; (3) an illegal use or abuse of the chattel; and (4) a wrongful detention after demand'. * * *

> "There must not only be an intent to convert, but it *must be accompanied by positive act of conversion.* However, if the act was unauthorized by the owner, an intent to convert will be conclusively presumed." (Italics ours.)

In the case of *American Surety Co. v. Hill County*, 254 S.W. 241, affirmed, 267 S.W. 265, the following terminology is found:

> "Generally before there can be a conversion of property, *there must be an act of malfeasance* and not a mere nonfeasance; a positive wrong and not the mere omission of what was right. This *act of malfeasance* may be committed by a tortious detention of the property from the owner, or by a destruction of the property, or by an exclusion or defiance of the owner's rights, or the withholding of possession under a claim of title inconsistent with that of the owner." (Italics ours.)

In *Gulf C. & S. F. Ry. Co. v. Buckholts State Bank*, 270 S.W. 1008, by the Texas Commission of Appeals, judgment adopted by the Texas Supreme Court, conversion is defined in the following terms:

> "*Any distinct act of dominion wrongfully exerted over* another's property, in denial of his right or inconsistent with it, is a 'conversion'. * * * In order to constitute an actual conversion of goods, there must be some repudiation of the owner's right, or some exercise of dominion over them inconsistent with such right, or some act done which has the effect of destroying or changing the quality of the chattel." (Italics ours.)

In *Davies v. Texas Central Ry. Co.*, 133 S.W. 295-7, 62 Tex. Civ. App. 599, it was said: "A conversion implies a wrongful act; a mere non-delivery will not constitute a conversion." And, in *American Cotton Co-op Ass'n. v. Plain-*

view Compress & Wrhs. Co., 114 S.W. 2d, 689, 692, (W. E. dism'sd) we find: "In order to establish an allegation of conversion it must be shown that the person charged unlawfully and wrongfully exercised dominion and control over property of another * * * ."

The Restatement of Torts, Sec. 224 codifies these holdings and those of the other states into the principle that mere non-feasance or failure to perform some act does not constitute conversion even though the person failing to act is under duty to act.

The lower courts in the instant case have failed to apply as to this Petitioner the law of the State of Texas applicable to conversion and this Court must review and correct the law as laid down by the lower courts in thus refusing to follow long recognized and established local law. There is still another point on Texas law that the Fifth Circuit failed to follow and that is in regard to joint or several liability of parties contributing to a tort loss. The injury took place in Texas, and Texas law in this regard should have been followed and was not, as will be hereinafter illustrated.

It must be borne in mind that under the stipulation of facts upon which this case was tried, the injury to Texaco, Inc., was a divisible injury in which each party selling oil, and thus under the jury findings, converting oil, had damaged the plaintiff to a specific amount that could be calculated to the penny, thus there was no joint liability on the part of the defendants. Each was responsible for the exact amount of conversion chargeable to him, or it. The

Texas law on this point is best expressed in *Landers v. East Texas Saltwater Disposal Co.*, 151 Tex. 251, 249 S.W. 2d, 731, decided by the Texas Supreme Court in 1952, with Justice Calvert writing the decision. It is most interesting to note the limitation the Court places upon the joint liability of tort feasors. It is specifically brought out in the opinion that if the amount of damage occurring by individual tort feasors can be apportioned with reasonable certainty, then, that joint liability does not occur. This is the holding of the Texas Supreme Court on the matter:

> "Where the tortious acts of two or more wrongdoers join to produce an indivisible injury, that is, an injury which from its nature cannot be apportioned with reasonable certainty to the individual wrongdoer, all of the wrongdoers will be held jointly and severally liable for the entire damages and the injured party may proceed to judgment against any one separately or against all in one suit."

In the present case, the damage could be apportioned exactly and under the ruling in the foregoing case, as well as, under the latter ruling of the Texas Supreme Court in the case of *Riley v. Industrial Finance Co.*, 157 Tex. 306, 302 S.W. 2d 652, the Fifth Circuit Court improperly held this Petitioner jointly liable for conversion committed by others, merely because Petitioner was the designated "operator" before the Railroad Commission of Texas. In doing this the lower Court departed from the substantive law of the State of Texas.

A most interesting case in regard to extent of liability of a tortfeasor has just been handed down by the Texas Su-

preme Court in the case of *Palestine Contractors, Inc. v. Perkins*, not yet reported in the official reporters, but shown in 8 Tex. Sup. Ct. J. 136, in which two tort feasors had caused a $26,500.00 loss to the plaintiff for which judgment was entered as to one. The record showed that the plaintiff had given a covenant not to sue to the other tort feasor who was insolvent. The Supreme Court following the ruling earlier laid down in *Gattegno v. The Parisian*, 53 S.W. 2d 1005, by the Texas Commission of Appeals in 1932, holding approved by the Supreme Court, reversed the judgment and reduced it to $13,250.00 holding that *the execution of the covenant not to sue had reduced the plaintiff's claim by one half*. Had the lower courts followed this rule of Texas substantive law, the plaintiff's execution of the covenant not to sue Texas Pacific & Oil Company in the instant suit would have reduced plaintiff's claim by one fourth, and at least that portion of the excess judgment against this Petitioner would have been eliminated. (R.-41)

Not one of the obligations set out in either Tex. Civ. Stat. Ann., (1925) Art. 6035, or Railroad Commission of Texas Rule 32, constitute a conversion of oil as a matter of law. Something must be shown to constitute a conversion and nothing was, as to the oil converted by other parties. It was the stipulation that Harrington had by division order, sold ¼th of the oil that cast him in damages for conversion of the value of ¼th of the oil. By the same token, it was the stipulation that the remaining ¾ths of the oil had been sold by others that cast them as converters of that portion of the oil. The mere designation, long after the well was drilled,

of Harrington as the designated "operator" before the Railroad Commission of Texas, could not constitute an act of conversion making this Petitioner responsible for that ¾ths of the oil which he did not sell or convert.

Without any proof as to what Harrington did as designated "operator" before the Railroad Commission, the Court of Appeals incorrectly cited *Summers, Oil & Gas*, Sec. 651-52 to say, "Generally, he is the man in charge." Summers does not support such a statement. However, liability should not have been imposed on Harrington because of some general condition the court may have thought existed. There was nothing in the instant record showing him to have been the man in charge. There is nothing showing him to have been in any different position than the other defendants, who were responsible only for the oil taken by them, sold by them, and the proceeds paid to them.

There is nothing in the statute or rule that says an operator shall be deemed to have immediate, practical operational command over the day-to-day production activities of the well, which the Court assumed would justify imposing greater liability upon Petitioner. There is nothing in the evidence to show that he had such immediate, practical operational command over the day-to-day production activities of the well.

The trial court and the Court of Appeals have held Harrington, who become a converter, without regard to intent, because of his sale of a portion of the oil and gas produced from such well drilled by Baton—liable, not only for his

divisible share of what was sold, but also, for that sold by the other defendants, merely because the lease was carried in his name on the records of the Railroad Commission as operator. There is no evidence in the record to show that he had charge of the lease. The proof by stipulation does show that each of them sold their own share of the oil and gas, executed their own division orders for such sales to the purchaser, and that each received separate payments from the purchaser.

Without direct Texas authority to support its position, the lower courts have:

1. Violated Texas principles of the law of conversion in holding Harrington liable for the conversion of others; and

2. Violated Texas principles of law in holding Harrington jointly liable for the conversion of others where damages are shown divisible; and

3. Violated the principles of Texas law in assuming facts not proven based on a Texas Statute and Rule not so providing.

These violations of Texas fundamentals have been brought about by reading into a Texas statute and Railroad Commission rule — intent, language, and liability that is not to be found in the wording or language of either. This far reaching decision does not affect Harrington alone. It will become precedent in every case of co-tenancy of oil and gas properties in Texas—with literally hundreds of thousands of

people involved all over the United States on all phases of the issue. If the Federal Courts are going to be so drastic in their rulings and so far depart from accepted and usual course of judicial proceedings, then the Supreme Court itself, should first examine the issue—weigh the consequences, and then decide if due process has been satisfied where the plaintiff is allowed recovery without meeting the burden of proof our law places upon every plaintiff when a defendant is brought before the bar of justice.

The Fifth Circuit Court assumed that certain duties were cast. There is no basis in the proof or in the stipulation for these assumptions. The Texas statute itself, and the Railroad Commission rule require only a form to be filed naming an operator, for the obvious purpose of identification of a particular lease or well and the giving of the operator's name, address, and whether an individual, trustee or a corporation has no bearing upon conversion. This information, or the filing of this form is not an act of conversion. Harrington was deprived of his rights and property by an erroneous ruling of the Fifth Circuit, which this Court is asked to rectify.

CONCLUSION AND PRAYER

This Court has not heretofore had the question at bar directly presented; and the question should be reviewed and directly answered by this Honorable Court.

WHEREFORE, your Petitioner respectfully prays that a Writ of Certiorari be issued to the United States Court

of Appeals for the Fifth Circuit to the end that this cause may be reviewed and determined by this Court; and

THAT, the decree of the Court of Appeals for the Fifth Circuit and the judgment of the trial court be reversed and that the judgment as to Petitioner be reformed as herein prayed for.

Petitioner Pro Se

H. M. HARRINGTON, JR.
324 Bramlette Building,
Longview, Texas.

CERTIFICATE OF SERVICE

I, H. M. Harrington, Jr., do hereby certify that a copy of the foregoing Petition for Writ of Certiorari has this day been mailed in an envelope properly addressed, with postage pre-paid to each of the following attorneys representing the Respondent, Texaco, Inc., to-wit: Lawrence Jack Moore, P. O. Box 2332, Houston, Texas, and to Jack Flock, Citizens Bank Bldg., Tyler, Texas.

H. M. HARRINGTON, JR. *Pro Se*

APPENDIX

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In the

DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS TYLER DIVISION

Civil Action No. 3028

TEXACO, INC.,

Plaintiff,

v.

H. M. HARRINGTON, JR., et al.,

Defendants.

(Heading added to Record)

(R. 35) **PRE-TRIAL ORDER**

(Filed May 9, 1963)

The parties to this action, through their attorneys appeared before this Court at a pre-trial conference, pursuant to Rule 16 of the Rules of Civil Procedure, on May 9, 1963, and the following acts were taken:

I.

It is ordered that all amendments to Plaintiff's pleadings be filed not later than May 25, 1963 and that all of Defendants' pleadings be filed not later than May 25, 1963.

II.

A. Plaintiff's suit is based upon the allegation that a well surfaced on Defendants' lease (described in Para. III of Plaintiff's First Amended Complaint) is a slanted or deviated well bottomed in, and producing from a point in, the subsurface of Plaintiff's 200-acre lease (described in Para.

II of Plaintiff's First Amended Complaint), that in the period from April 1952, when such well was drilled, completed, and placed on production until the well was shut-in in 1962, Defendants produced through such well, (R. 36) and sold to the various purchasers thereof, oil and gas which has a fair market value of approximately Six Hundred Seventy Thousand Dollars ($670,000.00). Plaintiff sues only for oil and gas taken from its seven-eighths (⅞) leasehold estate, not for royalty oil or gas. Plaintiff claims the right to recover on the basis of conversion, constructive trust, unjust enrichment, money had and received, implied promise to pay, for recovery of the value of the oil and gas unlawfully taken, and general relief is sought against the Defendants jointly and severally for the full amount.

B. Although having heretofore pleaded to the jurisdiction of the Court, because of the alleged non-joinder of Texas Pacific Coal & Oil Co., the Defendants have now waived such plea to the jurisdiction, and jurisdiction is conceded by all parties upon the grounds of diversity of citizenship in view of the compromise and settlement agreement between Plaintiff and such company, as hereinafter recited.

III.

The following facts are admitted and require no further proof:

A. That Plaintiff, Texaco Inc., is a corporation duly organized and existing under the laws of the State of Delaware, with its principal place of business in the State of New York; that the Defendants are all residents and citizens of

the State (R. 37) of Texas; that there is complete diversity of citizenship between Plaintiff and all Defendants; and that the amount in controversy, exclusive of interest and costs, exceeds the sum of Ten Thousand Dollars ($10,000.00).

B. That Plaintiff is, and has been at all times material to this case, the owner and holder of a valid and subsisting oil, gas and mineral lease executed by A. D. Snider and wife, Lula Snider, dated November 17, 1937, and recorded in Volume 167, page 34, of the Deed Records of Wood County, Texas, covering the following described land:

> 200 acres, more or less, being a part of the J. P. Moseley Survey, and being all of the same land conveyed to A. D. Snider by Moore Grocery Company, a corporation, by deed dated November 20, 1917, recorded in Volume 46, page 573-4, Deed Records of Wood County, Texas, to which said deed and the record thereof reference is here made for more complete description.

That, as the owner and holder of such oil, gas and mineral lease, Plaintiff is, and has been at all times material to this case, the owner of a determinable fee interest in and to all of the oil, gas and other minerals in, on, or under or that may be produced from such land, with the exclusive right to go on such land to explore for, produce, and reduce to possession, the oil, gas, and other minerals underlying the same, subject only to the royalty (R. 38) provisions of such lease; and that the royalty provided in such lease is one-eighth (⅛) of all oil and gas produced from such land, so that the net interest of Plaintiff in the oil and gas produced from such land amounts to seven-eighths (⅞). That Plaintiffs is the owner and operator of ten (10) producing oil and gas

wells on such 200 acre tract of land in the Hawkins Field, Wood County, Texas.

C. That adjacent to the above described 200 acre tract of land under lease to Plaintiff, and along a portion of the East boundary line of such 200 acre tract, there is situated a tract of land described as follows:

> A part and out of the Charles Duncombe Survey No. 316, Patent No. 313, Volume No. 2, Abstract No. 177, in Wood County, Texas, and described by metes and bounds as follows:
>
> BEGINNING at a point in the West boundary line of said Charles Duncombe Survey, the same being in the Northwest corner of the South one-half (S½) of said Charles Duncombe Survey and the beginning point of this tract;
>
> THENCE South along the West boundary line of said Charles Duncombe Survey 660 feet to a stake in the West boundary of said Survey;
>
> THENCE East, parallel with the North boundary line of the South one-half (S½) of said Charles Duncombe Survey, 1320 feet to a stake;
>
> (R. 39) THENCE North, parallel with the West boundary line of said Charles Duncombe Survey, 660 feet to a stake in the North line of the South one-half (S½) of said Survey;
>
> THENCE West, with the North boundary line of the South one-half (S½) of said Charles Duncombe Survey, 1320 feet to the place of beginning, and containing twenty (20) acres of land.

Such above described 20 acre tract was, in 1952, leased by the mineral owner, Texas Pacific Coal and Oil Company to H. M. Harrington, Jr., Reid H. Allgood, and Charles W. Lutes, for oil and gas development. The leasehold estate,

or working interest ownership of this oil and gas lease, at all times material to this lawsuit, was, and is, owned by the following persons: H. M. Harrington, Jr. — one-third (⅓); Charles W. Lutes — one-third (⅓); Reid H. Allgood — one-sixth (⅙); J. W. Baton — one-twelfth (1/12); and Douglas Godfrey — one-twelfth (1/12). The HAL Company - Texas and Pacific Coal and Oil Company Well No. 1 (also known as the H. M. Harrington, Jr. et al. - Texas Pacific Coal and Oil Company Well No. 1) whose surface location is on such tract, was drilled in the month of April, 1952. The name "HAL Company" originated as a designation of the operation for this particular well, taken from the first letter of the last names of the first above mentioned working interest owners. The Railroad Commission of Texas Form 7 designation of the operator of (R. 40) the well was filed by J. W. Baton, operating under the trade name of "HAL Company." The well was operated under this name from the date of the drilling of the well until July 30, 1953. Thereafter, H. M. Harrington, Jr. was designated operator of the well from that time until the well was shut-in during July of 1962. That through such well from the date of its completion in the year 1952, there have been produced approximately 285,000 barrels of oil and approximately 95,000 Mcf. of gas, having a combined fair market value of approximately Six Hundred Seventy Thousand Dollars ($670,000.00), that all of the oil and gas produced from such well was sold and proceeds of such sale distributed pursuant to division orders, or contracts of sale executed by

the foregoing working interest owners and the Texas Pacific Coal and Oil Company, covering its one-fourth (¼) royalty interest; that the money derived from the sale of the oil and gas produced through such well was distributed pursuant to such division orders as follows:

H. M. Harrington, Jr.	one-fourth (¼)
Reid H. Allgood	one-eighth (⅛)
Charles W. Lutes	one-fourth (¼)
John W. Baton	one-sixteenth (1/16)
Douglas Godfrey	one-sixteenth (1/16)
Texas Pacific Coal and Oil Company	one-fourth (¼)

D. That Plaintiff, Texaco Inc., and Texas Pacific Coal and Oil Company, on October 23, 1962, excuted an instrument entitled "Covenant Not to Sue" with regard to the moneys received (R. 41) by Texas Pacific Coal and Oil Company as royalties from the production and sale of oil and gas through the said H. M. Harrington, Jr. et al. - Texas Pacific Coal and Oil Company Well No. 1 and through the Earl Sharp - Texas Pacific Coal and Oil Company Well No. 1, under the terms of which: (a) Texaco Inc. covenanted and agreed not to file suit against Texas Pacific Coal and Oil Company; (b) Texaco Inc. received the sum of Thirty-five Thousand One Hundred Twenty-six and 01/100 Dollars ($35,126.01), of which the sum of Twenty Thousand One Hundred Nine and 59/100 Dollars ($20,109.59) was applicable to royalties received by Texas Pacific Coal and Oil Company on oil and gas produced through the said H. M. Harrington, Jr. et al. - Texas Pacific Coal and Oil Company Well No. 1; and (c) it was expressly provided that such "Covenant Not to Sue" does

not in anywise affect or relate to, nor in any release or discharge, any claim, demand, or cause of action which Texaco Inc. has, or may have, against H. M. Harrington, Jr., Reid H. Allgood, Charles W. Lutes, John W. Baton, and Douglas Godfrey, arising out of, or resulting from, the drilling and operating of the said H. M. Harrington, Jr. et al. - Texas Pacific Coal and Oil Company Well No. 1.

E. That the total liability, if any there be, of H. M. Harrington, Jr. Reid H. Allgood, Charles W. Lutes, John W. Baton, and Douglas Godfrey, to the Plaintiff, Texaco Inc., shall not exceed the fair market value of the oil and gas produced through the said H. M. Harrington, Jr. et al. - Texas Pacific Coal and Oil Company Well No. 1, Hawkins Field, Wood County, Texas, for the (R. 42) two (2) year period immediately preceding the filing of this lawsuit; that the fair market value of the oil and gas produced through such well during such period is Ninety-five Thousand Five Hundred Forty-six and 92/100 Dollars ($95,546.92).

F. That on July 29, 1962, pursuant to an agreed order of this Court, Sperry-Sun Well Surveying Company conducted a multi-shot directional survey on Defendants' well; a copy of the report of such survey has been filed with the Clerk of this Court as Exhibit A attached to Plaintiff's First Amended Complaint; and a copy thereof has been delivered to Defendants. That on the same date, pursuant to such agreed order, a gamma ray log was made of a portion of Defendants' well in the interval between the depths of 3450 feet and 5088.5 feet by McCullough Tool Company; and a copy of such log was delivered to Defendants by Plaintiff.

The expenses incurred in the making of such tests and surveys in the total amount of Three Thousand Two Hundred Eighty-six and 73/100 Dollars ($3,286.73), as evidenced by the bills heretofore filed by Plaintiff with the Clerk, have been paid by Plaintiff.

G. Without prejudice of any kind or character to its claims, rights, or causes of action against the remaining Defendants, Plaintiff has dismissed the Defendants, John W. Baton and Douglas Godfrey, as a result of a compromise and settlement agreement made with such parties under the terms of which they paid Plaintiff the sum of Twelve Thousand Thirty-four and 40/100 Dollars ($12,034.40).

H. Plaintiff has also dismissed the Defendants, United Drilling Company, in reliance upon the representations that (R. 43) such company had nothing to do with the drilling or operation of Defendants' well and did not exist as a corporation at the time such well was drilled.

CONTESTED FACT ISSUES

A. Whether or not Defendants' well is deviated and slanted into and bottomed in and on Plaintiffs 200 acre lease so that the oil and gas produced through Defendants' well was taken from or at a point in, on and under Plaintiff's said 200-acre lease.

B. Whether Plaintiff has been guilty of laches to now estop it from alleging or asserting claim to damages resulting from an alleged trespass in April of 1952.

CONTESTED ISSUES OF LAW

A. Whether or not Plaintiff's recovery, if any, against Defendants, should be reduced by the amount previously received by Plaintiff in compromise and settlement with a third party who received a royalty from the oil and gas produced through Defendants' well.

B. Whether or not the expenses incurred in the surveying and testing of Defendants' well, pursuant to the agreed order of this Court entered on July 28, 1962, should be taxed as costs against Defendants.

C. Whether the measure of damages, if any, is the fair market value of the oil and gas allegediy converted during the two (2) year period immediately preceding the filing of this case (R. 44) or whether the measure of damages, if any, is the difference in the value of Plaintiff's leasehold estate before such trespass and the value after such trespass.

EXHIBITS

Each of the parties shall have all exhibits marked by the Clerk of this Court, including all instruments which they propose to offer at the trial, except those to be offered by way of impeachment, and such exhibits shall, in addition, be exhibits to opposing counsel at least ten (10) days prior

to the trial. As the exhibits are marked the parties will specify which of such exhibits may be offered without further proof or objection to admissibility. DATED: May 9th, 1963.

/s/ JOE W. SHEEHY
Judge

APPROVED:

/s/ LAWRENCE JACK MOORE,
Attorney for Plaintiff,

/s/ H. M. HARRINGTON, JR.,
Attorney for Defendants.

In the
DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Civil Action No. 3028

TEXACO, INC.,

Plaintiff,

v.

H. M. HARRINGTON, JR., et al.

Defendants.

(Heading added to Record)

(R. 50) **JUDGMENT**

(Filed August 12, 1963)

1. BE IT REMEMBERED that the above styled cause came on for trial on July 18, 1963. The Plaintiff, Texaco Inc., appeared by its (R. 51) attorneys of record. The Defendants, H. M. Harrington, Jr., Reid H. Allgood, and Charles W. Lutes, appeared in person and by their respective attorneys. All parties announced ready for trial. A jury of twelve lawful persons was duly impaneled; the evidence was presented, first by Plaintiff, and then by Defendants; and both sides then rested their cases.

2. The case was submitted by the Court to the jury on general instructions and one special issue. The special issue was answered and returned by the jury as its unanimous verdict, and it was so received by the Court.

3. In due time, Motions for Judgment were filed by Plaintiff and Defendants. After considering such Motions for Judgment, together with the Stipulations, the Pre-Trial Order, the Verdict of the jury, and the briefs and argument

of counsel, the Court finds that the total value of the oil and gas produced from Defendants' well during the 2-year period immediately preceding the filing of this lawsuit is $95,546.92, and that the value of Plaintiff's seven-eighths (⅞) interest therein is $83,603.36. Prior to the trial of this case, Plaintiff received from Texas Pacific Coal and Oil Company, in settlement of Plaintiff's claim against such company for production from Defendants' well for more than ten years, the sum of $20,109.59; the Court finds that $4,020.00 of such sum should be apportioned to the last two years of such 10-year period and allowed as a credit against the amount due Plaintiff in this cause. Also prior to trial, Plaintiff received from John W. Baton and Douglas Godfrey the sum of (R. 52) $12,034.40 which it has agreed should be allowed as a credit against the amount due to it in this cause.

4. The Court, therefore, finds that Plaintiff is entitled to recover judgment herein for the value of its interest in the oil and gas produced from Defendants' well during the 2-year period immediately preceding the filing of this lawsuit, less such credits as above recited, plus interest at the rate of six per cent (6%) per annum from July 29, 1962, through July 28, 1963, and that of such total sum Plaintiff is entitled to recover judgment against H. M. Harrington, Jr. and Reid H. Allgood, jointly and severally, for the value of its interest in the oil and gas received by Allgood during such 2-year period, plus applicable interest, and against H. M. Harrington, Jr. and Charles W. Lutes, jointly and severally, for the value of its interest in the oil and gas re-

ceived by Lutes during such 2-year period, plus applicable interest, and against H. M. Harrington, Jr. for the balance, plus applicable interest.

5. It is, therefore, ORDERED, ADJUDGED, AND DECREED that the Plaintiff, Texaco Inc., do have and recover of and from the several Defendants as follows:

(a) H. M. Harrington, Jr., and Reid H. Allgood, jointly and severally, the amount of $11,077.47;

(b) H. M. Harrington, Jr., and Charles W. Lutes, jointly and severally, the amount of $22,154.93;

(R. 53) (c) H. M. Harrington, Jr., the amount of $38,369.71, in addition to the above amounts;

(d) The said awards are not cumulative and are separate and distinct, except when expressly stated otherwise;

(e) Each award bears interest at the rate of six per cent (6%) per annum from July 29, 1963;

(f) All costs of Court, including the sum of $3,286.37 for the costs of surveying and testing Defendants' well, are taxed against Defendants, jointly and severally;

(g) Execution shall be issued by the Clerk of this Court against the Defendants on the respective items as requested by Plaintiff.

ENTERED this 12th day of August, 1963.

/s/ JOE W. SHEELY
Judge

(R. 469)

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 21148

H. M. HARRINGTON, JR., et al., *Appellants,*

versus

TEXACO, INC., *Appellee.*

Appeal from the United States District Court for the Eastern District of Texas.

(December 4, 1964.)

Before RIVES and BROWN, Circuit Judges, and GARZA, District Judge.

BROWN, Circuit Judge: This slant hole oil well case presents the questions whether the technical evidence was sufficiently trustworthy to establish the deviation, whether an operator has a joint liability with other co-owners, whether allowance is to be made to the convertor for the cost of production, and whether proper credit was given (R. 470) for amounts received in settlement from other alleged convertors. We reject each of the complaints and affirm.

R.-470

On special interrogatories, F.R. Civ. P. 49, the jury found the well to have been deviated and bottomed under the adjoining Texaco lease. On the verdict the Court entered judgment for the stipulated value of the oil and gas extracted during the two-year period preceding the commencement of this action.[1]

The slanted well was drilled in 1952 on a twenty-acre tract. The mineral fee owner, Texas Pacific Coal and Oil Company, retaining a ¼ royalty interest, had leased the working interest to Harrington (¼), Allgood (⅛), Lutes (¼), Baton (1/16), and Godfrey, (1/16). In the beginning Baton, operating under the trade name of "HAL Company,"[2] was the operator of the well, and as such filed the required forms[3] and complied with the regulations of the Railroad Commission of Texas. Since July 30, 1953, Harrington has been designated as the operator. It is stipulated that from the time the well was completed until it was shut-in during July of 1962, $670,000 worth of oil and gas was produced from the well. During the two-year period, the royalty and lease owners received from pipeline purchasers a total of $95,546.92. Texaco, asserting that all of the oil and gas was taken from beneath its lease, claimed ⅞ of the amount paid ($83,603.56). Under (R. 471) an agreed court order, Sperry-Sun Well Surveying Company with the assistance of

[1] It is stipulated that damages would be limited to this two-year period. This was undoubtedly influenced by our decision in Pan Amer. Oil Corp. v. Orr, 5 Cir., 1963, 319 F. 2d 612, announced after the filing of this suit.

[2] The name "HAL" was apparently derived from the first letter of the names of Harrington, Algood, and Lutes.

[3] See Tex. Civ. Stat. Ann. art. 6035 (1962); Railroad Commission Rule 1.

McCullough Tool Company conducted a directional-deviational survey which revealed that defendants' well was slanted approximately 1600 feet to bottom under the Texaco tract. Over defendants' objection, the survey report was admitted into evidence. Judgment was entered for Texaco for full recovery of the market value of the oil produced less certain credits[4] for the principal sum of $67,549.16 adjudged specifically against the several defendants.[5]

As their principal attack on the merits, the defendants complain of the admission of the Sperry-Sun well survey report on the ground that a proper predicate was not laid, relying on Wigmore's statement of the back-up information which must be adduced in order to prove up the results of a scientific instrument.

> "A. The type of apparatus purporting to be constructed on scientific principles must be accepted (R. 472) as dependable for the proposed purpose by the profession concerned in that branch of science or its related art. * * *

[4] The credits allowed were:

(a) Amount of loss		$83,603.56
LESS:		
(b) Received in settlement from defendants Baton (1/16) and Godfrey (1/16)	$12,034.40	
(c) 1/5 of amount ($20,109.50) received by Texaco from Texas Pacific Coal and Oil Company in settlement	4,020.00	16,054.40
Amount of Judgment		$67,549.16

[5] With interest at 6% from July 29, 1962, the amounts adjudged were:

(a) Lutes (1/4) and Harrington jointly	$22,154.93
(b) Allgood (1/8) and Harrington jointly	11,077.47
(c) Harrington	38,369.71
	$71,602.11

"B. The particular apparatus used by the witness must be one constructed according to an accepted type and must be in good condition for accurate work. * * *

"C. The witness using the apparatus as the source of his testimony must be one qualified for its use by training and experience."[6]

The structure of the objection is then built on the dual assertion that (a) Texas has recognized this principle,[7] and (b) the Texas law of exclusion is controlling. Analysis shows that the principle (a) is satisfied and, of course, as to (b) it is now clear that F.R. Civ. P. 43(a) is to be applied to favor the receipt, not the exclusion, of evidence. *Monarch Ins. Co. of Ohio v. Spach*, 5 Cir., 1960, 281 F. 2d 401; *Dallas County v. Commercial Union Assur. Co., Ltd.*, 5 Cir., 1961, 286 F. 2d 388.

The requirements of the rule may be established by expert opinion as was unquestionably done here. The qualification of plaintiff's witnesses Gurasich and Sellers as experts amply appears from the record. Both were graduate engineers employed for a number of years by Sperry-Sun, and both were directly concerned with oil well surveys. (R. 473) Gurasich was the Senior Survey Engineer in charge of surveying practices and had been involved for a number of years in testing and improvement of well survey techniques. His testimony demonstrated the reliability and acceptance of the gyroscopic principles involved in the well survey unit

[6] Wigmore, The Science of Judicial Proof 450.

[7] They urge Wilson v. State, 1959, 168 Tex. Crim. 439, 328 S.W. 2d 311 (results of radar unit for detection of speed).

here utilized. Sellers, the Sperry-Sun operator who conducted the survey on defendants' well, testified as to the good working condition of the particular apparatus used and the correctness of the particular test conducted. This was corroborated by the testimony of Davis, the McCullough Tool Company employee of seven years, who made the measured depth determination by use of a "wire line" device.

The defendants argue that the well survey report and all exhibits gleaned therefrom should be rejected because the particular apparatus had been introduced only a few months before its use here. But this is only partially true. The unit used here had an outside diameter of 2½ inches as compared with 4½ inches for the gyroscopic mechanism with a reputation for reliability established over a period of several years. This miniaturization, necessary for smaller well bores, carried with it a sizeable reduction in the weight of the "mass" and a tripling of the velocity of the gyro. Because of these differences and its relative newness, the defendants argue that it could not have been "accepted," and likewise the operator could not have been "experienced."

However, there is adequate testimony to demonstrate that the unit's accuracy was thoroughly tested by Sperry-Sun (R. 474) (whose reputation and good standing in the field was on the line) before introduction for general oil-field use. For like reasons, the defendants' argument that because of the novelty of the unit, Sellers, the operator of the unit, lacked the necessary experience falls short. There is ample evidence to indicate that, even though there were some differences be-

tween the 4½ inch gyro and the newer 2½ inch one, they were operated similarly. Thus Seller's skill and experience in operating the larger one carries over to the other. There was ample basis for the Court concluding that the reliability of the device had been adequately established by studies, experiments, and field use.

The objection that the survey was inconclusive because the proof of the length of the "hypotenuse" was established only by hearsay is similarly without merit. The reports of the McCullough wire line service were received without objection. On numerous runs into the well, conducted by a qualified operator, a measured depth of 5080 to 5090 feet was established. None of those figures was challenged despite the fact that the survey reports were filed and available for study as the basis of an attack by experts on behalf of the defendants.

We conclude that this directional-deviation survey was properly admitted.

The next attack relates to Harrington alone. He complains of the entry of judgment against him for an amount in excess of that actually received by him. The judgment cast Harrington jointly for amounts received by Allgood (R. 475) and Lutes (see note 5, items (a) and (b)), whereas each of them was held to account only for what each received.[8] The basis for holding Harrington jointly liable with every-

[8] The practical effect is also to impose a joint liability against Harrington for amounts received as royalties by Texas Pacific to the extent full credit for the settlement amount is not accorded. This aspect is later discussed.

one receiving payment for oil taken from Texaco is that he was the designated operator-lessee[9] of the well.

As designated operator, under the relevant statutes and Railroad Commission regulations,[10] a number of important obligations rested on him, compliance with which inevitably put the "operator" in operational control of continued production by the well. Thus, Railroad Commission Rule 32 requires the operator to keep regular and complete records of production, sales, receipts, business disbursements, etc. He must file the official, periodic production reports with governmental agencies and make reports of work-overs and the like. Generally, he is the man in charge. See Summers, Oil & Gas §§651-52 (1962).

The fact that no effort was made to establish that Harrington had wilfully deviated the well is not relevant to the joint liability issue since such intent is not required to make out conversion. 14 Tex. Jur. 2d *Conversion* §3. It is entirely reasonable to subject a designated operator having such immediate, practical operational command over day-to-day production activities of the well to an accountability for an unlawful conversion of all of the oil. (R. 476) He has in fact the full means of knowledge and the full means, at least initially, of ceasing production if any question exists as to the legality of production. It was thus permissible for Harrington to be held jointly with each of his co-lessees.

[9] The question whether the other owners of the working interest — Allgood and Lutes — should, along with Harrington, be held jointly liable for all oil taken is not before us.

[10] Tex. Civ. Stat. Ann. art. 6035 (1962); Railroad Commission Rule 32.

Also involved in the judgment against Harrington (item (c), note 5) is the problem of the extent to which credit should be given for the amount ($20,109.59) received by Texaco from Texas Pacific in settlement.[11] The Court allowed a credit of $4,020.00 (see item (c), note 4). Harrington urges that full credit should have been accorded.

The law of Texas is clear on the general proposition that a wronged party is entitled to one, and only one, full recovery—that is, full satisfaction of his loss. Consequently, although a single joint tortfeasor may be sued for the total, anything received in settlement from the non-sued tortfeasor must be set off as a credit against the amount recoverable from the other tortfeasors. *Riley v. Industrial Finance Service Co.*, 1957, 157 Tex. 306, 302 S.W. 2d 652; *Landers v. East Texas Salt Water Disposal Co.*, 1952, 151 Tex. 251, 248 S.W. 2d 731; *Bradshaw v. Baylor University*, Tex. Com. App. (opinion adopted), 1935, 126 Tex. 99, 84 S.W. 2d 703; *Hill v. Budget Finance & Thrift Co.*, Tex. Civ. App., 1964, ... S.W. 2d ..... (No. 16,411, October 9, 1964).

Harrington argues that this case fits neatly within these rules. But this case is different in one very important (R. 477) respect. Although in the case as tried against Harrington, Texaco sought recovery for only the amount of oil taken during the last two years[12] ($83,603.56), its loss, or damage,

[11] Texas Pacific Coal and Oil Company was not a party to this suit. The defendants originally urged that Texas Pacific was an indispensable party, but this contention was later formally abandoned. No steps were ever taken by the defendants to bring it in as a third party.

[12] See note 1, supra.

was the stipulated value of the oil taken over a ten-year period ($586,000). Of that total, about $167,000 was received as royalties by Texas Pacific. On October 23, 1962, about six months before trial and during the time Texaco was still pressing its claim against all for the full ten-year loss, Texaco received $20,109.59 in settlement from Texas Pacific.[13]

Harrington, as a joint tortfeasor seeking to obtain a credit, had the burden of showing that the amount received in settlement from Texas Pacific was allocable to the last two-year period for which he, Harrington, was being sued. There was no proof offered. There was only the stipulation giving the names of the parties who had settled and the amounts. Although the amount of the settlement is singularly close to the amount of royalties received by Texas Pacific during the last two years,[14] there is no evidentiary basis for disturbing the inference drawn by the Trial Judge from the sparce data before him that the amount received in settlement was allocable to the entire loss of Texaco over the ten-year period. The rule requiring credit is to avoid the inequity of a party profiting by his misfortune. With such an objective the rule does not require that the injured party give the benefit of any statute of limitations to the judgment-tortfeasor. The

[13] This settlement was part of a larger one between Texaco and Texas Pacific and covered royalties received on two tracts.

[14] It was stipulated that Texas Pacific received in this period the sum of $20,900.89.

loss (R. 478) against which credit must be given is the loss as sustained in fact, not merely that which can then be legally recovered. Consequently, when the Judge treated this as having been received against the ten-year total claim, it was more than equitable that he gave credit for 1/5 representing two of the ten years.

By their last point, appellants argue that the Court erred in entering judgment for the value of the oil taken without reduction for the "costs of production."

Again, some unique record factors bear some comment. First, the position urged strongly in the trial court in the initial stages, but now practically abandoned, was that Texaco's damages must be limited to the difference in the evaluation of the mineral estate before and after the trespass and conversion is clearly without merit. The abandonment here involves no real concession. It merely recognizes the Texas law. Under Texas law, these defendants were guilty of conversion of personal property,[15] and under the general rule the measure of damages is the value of the converted property, 14 Tex. Jur. 2d *Conversion* §§ 1, 3, 9, 24 — in this case, the value of the oil at the surface. Of course, what the defendants seek is the sweet with the bitter of Texas law. They urge the strong authority that

[15] In Texas, oil and gas is regarded as realty when in place, but as personalty when severed. W. B. Johnson Drilling Co. v. Lacy, Tex. Civ. App. no writ history, 1960, 336 S.W. 2d 230: 14 Tex. Jur. 2d *Conversion* § 9.

where the wrongful taking is innocently done, one guilty of conversion is entitled to set off the costs of production.[16] (R. 479)

More significant, this contention now asserted was not an issue tried below. The pretrial order defined both the fact issues and the issues of law. Under neither was it even remotely suggested that credit for cost of production was involved.

But treating it as properly preserved below and asserted here, no error is made out. It is clear that the convertor — the party seeking the benefit of the set-off — has the burden of pleading and proving that (a) the conversion was not wilful, and (b) the dollar amount of the claimed costs of production. *Right of Way Oil Co. v. Gladys City Oil, Gas & Mfg. Co.*, 1913, 106 Tex. 94, 157 S.W. 737, 740; 43 Tex. Jur. 2d *Oil & Gas* §565. This is a sensible rule since the

[16] Bender v. Brooks, 103 Tex. 329, 336, 127 S.W. 168, 171; Stroud v. Guffey, Tex. Civ. App., 1927, 3 S.W. 2d 592, aff'd, 125 Tex. 540, 16 S.W. 2d 527; Cage Bros. v. Whiteman, Tex. Com. App. (opinion adopted), 1942, 163 S.W. 2d 638, 641-42. Professor Summers, after discussing the history, development and application of the good faith trespasser rule, states: "But in the oil and gas cases the * * * rule has been uniformly applied, by giving as damages the value of the oil and gas *in situ*, and, if impractical to fix their value in this manner, to give as damages the value of the oil and gas in the tank or pipe line less the reasonable cost of production. The theory of this rule in its operation is that the trespasser, because of his good faith, has the legal power by his improvement to acquire title by accession. In the taking of oil and gas, the severance and improvement are accomplished by the same physical act. On principle, the measure of damages must be the value of the oil and gas as they existed in the earth. But the value of these substances, *in situ*, because of their peculiar nature and the uncertainty and difficulty of their production, is hard to prove. The courts have therefore resorted to an earlier method of proof; that is, the value of the oil or gas less reasonable cost of production. 1 Summers, Oil & Gas §24, at 54-60 (1954) (citing, as being in accord, Bender v. Brooks, supra).

facts necessary to establish good faith and the amount to be set off are peculiarly within the knowledge of the convertor.

As to element (b), it is true that the defendants complain of the exclusion of evidence that at the time the well was (R. 480) being completed Harrington was in a distant city trying a lawsuit. In view of the defendants' pretrial motion to exclude any evidence bearing on defendants' "good faith" since it was no longer pertinent to the period — ten years or two years — for which recovery could be had,[17] we do not think this was erroneous. But in any event, there was no attempt either to prove or proffer evidence on element (b) as to the costs actually incurred in the "innocent" "good faith" production. No one can claim he has been denied a credit for expenses incurred when the nature or dollar costs of such services is nowhere established.

All three appellants contest the Court's taxing as costs any portion of the expense of the Sperry-Sun well survey. Alternatively, they assert that if taxable at all, the expense should be apportioned. As to the alternative contention, they urge that the results of the survey prompted three of the parties to make approximately 100% settlement, for a total amount equal roughly to the value of 1/3 of the oil produced during the last two years. In view of this, they contend that the costs to be allowed, if any, should be apportioned to account for the settlements.

Quite apart from the wide and general discretion in the trial court to assess special costs, one unique factor of this

[17] See notes 1 and 12, supra.

record has been completely ignored in these attacks. The trial court, with no objection indicated by any party, entered a special order providing for the Sperry-Sun survey. This accorded valuable rights to all, not the least of which was the right of the defendants to have copies of the reports and annexed data. The order further specifically (R. 481) provided that the expense of the survey on being ascertained would be taxed at costs. Later on, the formal pretrial order, F.R.Civ.P. 16, which did reserve the law question of taxability, fixed the dollar amount of the expense. No objection has ever been made as to the amount.

But in any event, we have no doubt as to the acceptability of the taxation of these costs. While it is true that the rule allowing this kind of discovery, F.R.Civ.P. 34, does not mention costs, the power of the trial Judge to tax as costs the necessary and reasonable expenses incurred in discovery procedures can hardly be doubted. Under F.R.Civ.P. 54(d), the allowance of costs to the prevailing party is within the discretion of the trial Judge, and his determination will be sustained unless he lacks the power[18] to tax a particular item or abuses his discretion. 3 Barron & Holtzoff, Federal Practice & Procedure §1195 (Wright ed. 1958). Reasonable and necessary expenses for depositions as well as the cost of "preparing models, drawings, charts, photographs and other exhibits may be a taxable expense * * *" 3 Barron & Holtzoff §1197. Since the well survey was obviously the most scientific and reliable way to determine the critical issue in this case, and there

[18] Cf. United States v. Kolesar, 5 Cir., 1963, 313 F. 2d 835.

being no doubt as to its reasonableness or necessity; there can be no question as to the trial Judge's power to assess this item against the defendants as costs.

This leaves only the question of the propriety of not apportioning the total expense to take into account the settlements. We hold there was no error. Whatever might have been the influence of the survey report on those who (R. 482) settled, the fact remains that it was these defendants who not only (a) resisted Texaco's claim but, in doing so, (b) challenged the admissibility of the survey evidence. It took a trial to prove each of these positions unsound. The successful plaintiff is entitled to recover its taxable costs to achieve that legal determination. This is a matter properly within the discretion of the trial Judge, and it is sufficient to say that under our system of procedure, being saddled with the entire cost burden is one of the risks of litigation, and avoidance of costs, generally, one of the advantages of settlement.

The result is that the judgment for Texaco was correct.[19]

AFFIRMED

[19] The assignment from defendants to Texaco of funds held in suspense by the pipeline is a matter between the parties relating to the satisfaction, not the amount, of the judgment and one on which we need not pass.

EXTRACT FROM THE MINUTES OF DECEMBER 4, 1964.

United States Court of Appeals
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1964

No. 21,148

D. C. Docket No. 3028-Civil

H. M. HARRINGTON, JR., et al, *Appellants,*

versus

TEXACO, INC., *Appellee.*

Appeal from the United States District Court for the Eastern District of Texas.

Before RIVES AND BROWN, Circuit Judges, and GARZA District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the

said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the Appellants, H. M. Harrington, Jr., and others, be condemmed, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

December 4, 1964

Issued as Mandate: Feb. 18, 1965

(R. 507)

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 21,148

H. M. HARRINGTON, JR., et al.,

Appellants,

v.

TEXACO, INC.,

Appellee.

Appeal from the United States District Court for the Eastern District of Texas.

(February 9, 1965)

On Petition for Rehearing

Before RIVES and BROWN, Circuit Judges, and GARZA, District Judge PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above entitled and numbered cause be, and the same is, hereby DENIED.

U. S. Court of Appeals

Filed

February 9, 1965

Edward W. Wadsworth, Clerk

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